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No. ~~1516~~ 230

IN THE

Supreme Court of the United States

October Term, 1968

H. K. FORTER COMPANY, INC.,
DISSTON DIVISION—DANVILLE WORKS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Does the Board have power to order an employer to agree to a union's request for the checkoff of union dues in the following circumstances: the employer had repeatedly bargained in bad faith with the union and had thereby avoided entering into a collective bargaining agreement for several years; one of the employer's acts of bad faith was refusing the union's checkoff request for the purpose of frustrating agreement and undermining the union; the employer admitted that, except for this purpose (which the Board found unlawful), it had no objection to the union's request; nevertheless, after the Board found the employer's purpose unlawful, the employer continued to refuse the union's request, offering no reason for its continued resistance.

COUNTER-STATEMENT OF THE CASE

Petitioner ("the Company") seeks review by this Court of the propriety of a remedy issued by the Board and enforced by the court below. The Company heretofore sought review of the underlying finding of violation for which this remedy was provided, but this Court denied certiorari, 385 U.S. 851 (1966).

The petition does not describe the violation for which the challenged remedy was provided. We believe the remedy cannot properly be assessed without an understanding of the violation it was designed to cure.

The Union, which was the charging party before the Board, was certified as the bargaining representative of the production and maintenance employees of the Company's Danville, Virginia plant on October 5, 1961. Several years of bargaining ensued, in which the Company repeatedly bargained in bad faith,[1] and in which the Union was unable to secure a contract. Throughout the bargaining, a key issue was the Union's request for a "checkoff" clause, i.e., an agreement by the Company that it would deduct union dues from the wages of those employees who voluntarily authorized such deductions pursuant to Section 302 of the Labor Management Relations Act (hereinafter "the Act"), 29 U.S.C. § 186. The Company consistently and adamantly refused to agree to this request.

In its meetings with the Union, the Company gave only one reason for its refusal to agree to the checkoff—that the collection of union dues is "union business." (J.A. 16, 28). At the hearing before the Board, the Company explained that "we were not going to aid and comfort the International Union at this location" (J.A. 34, 31, 35), and its counsel acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union." (J.A. 11).

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[1] The history of bargaining and of findings of bad faith is recounted in the opinion of the court below (Petition, Appendix, pp. 15-18).

The Company admitted at the hearing that it has made deductions from employees' wages at their request for other purposes, including the purchase of United States Savings Bonds, the purchase of optional insurance coverage for employees' dependents, contributions to the United Fund, and contributions to a so-called "Good Neighbor Fund" (which was administered by the employees, prior to their unionization, for parties, charitable donations, gifts to employees who were hospitalized or who suffered a loss in the family, etc.). None of these deductions is required by law. (J.A. 25, 27, 44).

The Company also admitted that there would be no inconvenience involved in checking off union dues (J.A. 28), and that in fact it does check off union dues at some of its other plants (J.A. 32).

Finally, the Company admitted that it had no objection to the Union's request for checkoff except its unwillingness to give "aid and comfort" to the Union (J.A. 27-28, 29-31, 35). As the Company's attorney put it in his closing argument to the Trial Examiner (J.A. 35):

> "[W]e have stated our purpose; we have stated it plainly here many times, that our purpose in denying checkoff was that we were not going to aid and comfort the union . . ."

The Trial Examiner found that the Company had engaged in bad-faith bargaining in violation of Sections 8(a)(5) and (1) of the Act. (J.A. 48-51). He concluded from all the evidence that the Company's sole reason for refusing the checkoff was to "frustrate agreement with the Union." (J.A. 49). The Company's explanation for its position—that it did not wish to give aid and comfort to the Union—was held by the Trial Examiner to "evidence an attitude inconsistent with the obligation imposed . . . by

the Act" to bargain in good faith and with a sincere desire to reach agreement (*Ibid*). As a remedy, the Trial Examiner simply ordered the Company to bargain in good faith. The Board issued a "short form" decision affirming the Trial Examiner in all respects. The Court of Appeals enforced the Board's order, and specifically affirmed that "it is clear from the record that the Company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues checkoff." 363 F.2d 272, 276 (D.C. Cir., 1966). In its opinion, the court interpreted the Board's order as requiring the Company to withdraw its resistance to the Union's checkoff request, for "to suggest that in further bargaining the Company may refuse a checkoff for some other reason not heretofore advanced, makes a mockery of the collective bargaining required by the statute." 363 F.2d 272, 276, n. 16. This Court denied certiorari, 385 U.S. 851 (1966).

Thereafter, in subsequent bargaining, the Company continued to refuse the Union's checkoff request. The Company offered no reason for its refusal, simply stating that it did not construe the Board's order as requiring that it agree to the request. There eventuated another round of legal proceedings, culminating in the Board's supplemental order, enforced below, expressly requiring the Company to agree to a checkoff clause.

ARGUMENT

The Company attempts to paint a conflict between the Board's order in this case and Section 8(d) of the Act as interpreted by this Court.[2] As the court below cogently

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[2] *NLRB* v. *American National Ins. Co.*, 343 U.S. 395, 404 (1952); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 486-87 (1960).

demonstrated, there is no such conflict. Accordingly, this case is not worthy of review by this Court.

Section 8(a)(5) imposes upon employers the substantive duty to bargain in good faith. Section 8(d) defines that duty. As part of its definition, Section 8(d) provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession."

Section 8(d) relates to the question of *whether* an employer has bargained in bad faith, not to the remedy which should flow if he has. The quoted portion of 8(d) was enacted to prevent the Board from insisting that an employer abandon a position maintained in *good faith* merely because, in the Board's view, the position is "unreasonable, or unfair, or impractical, or unsound." *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (1960). For example, in *NLRB* v. *American National Ins. Co.*, 343 U.S. 395 (1952), this Court reversed a Board decision finding an employer in bad faith solely because a "management rights" clause insisted upon by the employer was, in the Board's view, too broad.

In the instant case, the Board's underlying finding of violation was not premised on any notion that employers may not refuse checkoff requests, but rather on a finding that *this* employer was unlawfully motivated in refusing the request. That factual finding was affirmed by the court below in its initial decision, 363 F.2d 272, and this Court denied certiorari, 385 U.S. 851 (1966). The issue now advanced to this Court relates to the *remedy* which the Board may provide for this properly-found violation. Section 8(d) is not addressed to the Board's remedial powers. It is Section 10(c) which defines the Board's power in fashioning remedies, and Section 10(c) mandates the Board, without restriction, to order a violator "to take such affirmative action . . . as will effectuate the policies of the Act." As the court below recognized, there is nothing in

Section 10(c), nor in any of the decided cases, which precludes the type of remedy ordered here.

Indeed, any other result would render the Act's bargaining obligation a nullity. After the initial Board order was enforced, the Company was left admittedly with no objection to the Union's checkoff request. Nevertheless, it continued to refuse to grant the request, offering no reason at all for its refusal. Of what value is Section 8(a)(5) if, after bad faith has been found, the employer may respond by silent, unexplained refusal to proceed further? This Court has recognized that good faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 485 (1960). The Board's remedy in this case —requiring a recidivist bad-faith employer who lacks a lawful objection to a union request to grant that request— effectuates this policy of the Act.

Even if Section 8(d) related to remedy—and we have shown above that it does not—it would not preclude the Board's order in this case. The refusal to make concessions cannot be used "as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." *NLRB* v. *Herman Sausage Co., supra,* at 231. Rather, this provision of Section 8(d) means only that an employer need not yield "positions fairly maintained." *Ibid.* Where, as here, an employer has no objection to a union proposal, or has only an unlawful objection, this provision of Section 8(d) is inapplicable. The employer who has no objection to a union proposal makes no "concession" when he incorporates that proposal into a collective bargaining agreement.

The order entered in this case conflicts with no decision of any court, and raises no issue worthy of review by this Court.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be denied.

Respectfully submitted,

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